

A Kuan Chit & Ors v Daro (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22-420 OF 1997

B 1997
HELILIAH J
30 JULY 2009

C *Contract — Breach — Agreement — Joint venture agreement to develop land — Plaintiff surrendered portion of reserved land to government pursuant to agreement — Defendant applied for alienation of reserved land and erected houses — Whether defendant's act amounted to making secret profits — Whether defendant acted in breach of agreement*

D

Contract — Breach — Breach of duty — Defendant granted irrevocable power of attorney — Whether defendant used power of attorney to his advantage — Whether acted in breach of duty

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The plaintiffs who were the registered proprietors of a piece of land entered a joint venture agreement ('the agreement') with the defendant to develop the piece of land in accordance to a Housing Scheme. The plaintiffs had appointed the defendant to act on behalf of them by giving an irrevocable power of attorney to the defendant to undertake matters relating to the development of the piece of land. The plaintiffs by virtue of the agreement would be entitled to certain percentages of houses/apartments/flats built by the defendant. The plaintiffs would also be entitled to 30% of all waste/unused land from the piece of land. In accordance to the agreement and the housing scheme, certain portion of the land was surrendered to the government for construction of (i) a mosque, (ii) a road and (iii) an allocation for an open area ('the reserved portion of the land'). The defendant applied for an alienation of the reserved portion of the land upon knowing that the government did not require the use of the reserved portion of the land. Subsequently, the defendant subdivided the reserved portion of the land and erected houses. The plaintiffs discovered that the mosque had not been constructed and the construction of houses on the reserved portion of the land. The plaintiffs alleged that the defendant had breached the agreement and its fiduciary duty. The defendant submitted that the reserved portion of the land ceased to be the subject matter of the agreement since the reserved land was surrendered to the government. Hence, the defendant had applied for the government's land and not the land which was the subject matter of the agreement. The defendant argued that there was no fiduciary duty owed

to the plaintiffs as there was no intention to create any fiduciary relationship between the plaintiffs and the defendant under the agreement. The plaintiffs sought declaratory order, inter alia; that a sum equivalent to 30% of the market value of the houses erected on the reserved portion of the land and 30% of the market value of the reserved portion of the land set aside for the construction of a mosque.

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Held, allowing the plaintiffs' alternative claim:

- (1) The defendant had failed to furnish any credible evidence pertaining to the alienation of the piece of land not required by the government for road construction. The failure by the defendant, a developer, to furnish details when the alleged acquisition was allegedly to have occurred was questionable and odd (see para 23).
- (2) The defendant was not a broker and in dealing with the alleged surrender in a manner that was subterfuge in character it tantamount to a repurchase of his principal's interests and hence amounting to making a secret profit. It could not be said that the plaintiffs could no longer have an interest when the land was no longer required for public purposes. The 'alleged surrender' of the land did not change its character of 'unused unwanted land' since the way in which the dealings with the land by submitting fresh layout plans and prior computation without material disclosure to the plaintiffs led to the inference that the defendant knew before hand that the piece of land was not intended for the purpose for which it was supposed to have been surrendered (see paras 24–25).
- (3) The defendant was using to his advantage the power of attorney in a manner that was in breach of his duty. An adverse inference was capable of being drawn against him. The alternative relief sought was a more appropriate remedy since the houses constructed on the reserved portion of the land may not be capable of being allotted to the plaintiffs (see paras 26–27).

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[Bahasa Malaysia summary]

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Plaintif-plaintif merupakan tuan punya berdaftar sebidang tanah yang telah menandatangani perjanjian usaha sama ('perjanjian tersebut') dengan defendan untuk membangunkan tanah tersebut kepada skim perumahan. Plaintif-plaintif melantik defendan untuk bertindak bagi pihak mereka dengan memberikan surat kuasa wakil tak boleh batal kepada defendan untuk melakukan perkara-perkara berhubung dengan pembangunan tanah tersebut. Menurut perjanjian plaintif-plaintif berhak untuk beberapa peratusan rumah-rumah/apartmen-apartmen/flat-flat yang dibina oleh

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- A defendan. Plaintiff-plaintiff juga berhak kepada 30% daripada kesemua tanah terbiar/tidak digunakan daripada tanah tersebut. Menurut perjanjian dan skim perumahan tersebut, beberapa bahagian tanah tersebut diserahkan kepada pihak kerajaan untuk pembinaan: (i) sebuah masjid; (ii) sebatang jalan dan (iii) peruntukan kawasan lapang (bahagian tanah rizab).
- B Defendan memohon untuk pemberi milikan bahagian tanah rizab selepas mengetahui pihak kerajaan tidak memerlukan penggunaan bahagian tanah rizab tersebut. Kemudiannya, defendan memecahbahagikan bahagian tanah rizab tersebut dan mendirikan rumah-rumah. Plaintiff-plaintiff mendapat tahu bahawa masjid tidak didirikan dan rumah-rumah dibina di atas bahagian tanah rizab tersebut.
- C Plaintiff-plaintiff menghujah bahawa defendan telah melanggar perjanjian dan kewajiban fidusiarinya. Defendan menghujah bahawa bahagian tanah rizab tersebut tidak lagi menjadi perkara subjek perjanjian memandangkan tanah rizab tersebut telahpun diserahkan kepada pihak kerajaan. Oleh itu, defendan telah memohon untuk tanah kerajaan dan bukannya tanah yang menjadi perkara subjek perjanjian. Defendan menghujah bahawa tidak terdapat kewajiban fidusiari kepada plaintiff-plaintiff memandangkan tidak terdapat niat untuk mewujudkan sebarang hubungan fidusiari di antara plaintiff-plaintiff dan defendan di bawah perjanjian tersebut.
- D Plaintiff-plaintiff memohon satu perintah deklaratori, antara lain, bahawa jumlah bersamaan 30% daripada nilai pasaran rumah-rumah yang didirikan di atas bahagian tanah rizab tersebut diketepikan untuk pembinaan masjid.
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- F **Diputuskan**, membenarkan tuntutan alternatif plaintiff-plaintiff:
- (1) Defendan telah gagal untuk memberikan apa-apa keterangan yang boleh dipercayai berhubung dengan pemberi milikan tanah tersebut yang tidak diperlukan oleh pihak kerajaan untuk pembinaan jalan. Kegagalan oleh defendan, sebagai pemaju, untuk memberikan
- G butiran-butiran bila pemerolehan tersebut berlaku boleh dipersoalkan dan ganjil (lihat perenggan 23).
- (2) Defendan bukanlah seorang broker dan dalam berurusan dengan penyerahan yang didakwa secara yang bersifat penuh muslihat ia merupakan membeli semula kepentingan dasarnya dan menjadikannya memperoleh keuntungan secara rahsia. Tidak boleh dikatakan bahawa plaintiff-plaintiff tidak lagi mempunyai faedah apabila tanah tersebut tidak lagi diperlukan untuk tujuan awam. 'Alleged surrender' tanah tersebut tidak mengubah ciri 'unused unwanted land' memandangkan
- H cara urusan niaga tanah dengan mengemukakan pelan susun atur baru dan pengiraan sebelum, tanpa penzahiran material kepada plaintiff-plaintiff menimbulkan inferens bahawa defendan tahu sebelum ini bahawa tanah tersebut tidak diniatkan untuk tujuan yang mana sepatutnya ia diserahkan (lihat perenggan 24–25).
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- (3) Defendan telah menggunakan surat kuasa wakil untuk mendapat manfaat daripadanya dengan cara yang melanggar kewajipannya. Satu inferens bertentangan boleh dibuat terhadapnya. Relief alternatif yang dituntut merupakan remedi yang sesuai memandangkan rumah-rumah yang dibina di atas bahagian tanah rizab tidak boleh diberikan kepada plaintif-plaintif (lihat perenggan 26–27).]

Notes

For a case on breach of duty, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2546.

For cases on agreement, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2523–2529.

Cases referred to

Bryant, Powis & Bryant Ltd v La Banque du Peuple [1893] AC 170, PC (refd)
Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481, CA (refd)
Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474, SC (refd)

Legislation referred to

National Land Code s 300

Nor Amimi bt Sepit (Othman Hashim & Co) for the plaintiffs.
Roy Sreenivasan (Sreenivasan Tan) for the defendant.

Heliliah J:

[1] In this action the plaintiff's claims are for several declaratory orders.

THE PLAINTIFF'S CASE

[2] The plaintiffs were the registered proprietors of a whole piece of land held under Geran No 23269, Lot No 1580 Mukim Cheras, and Daerah Ulu Langat ('said land'). Pursuant to a joint venture agreement dated 28 January 1992 entered into between the plaintiffs and the defendant, the defendant undertook to develop the said land into a housing scheme on a joint venture basis.

[3] It is provided under the agreement that the plaintiffs are entitled to certain percentage of houses/apartments/flats built by the defendant. According to Part 3 Schedule 1 of the agreement the plaintiff shall be entitled to 30% of all waste/unused land, if any from the said development.

A [4] Under the building plans and specifications to the housing scheme as annexed to the said agreement, a certain portion of the said land was reserved for:

(a) the construction of a mosque;

B (b) the construction of a road; and

(c) open area.

C [5] The above (a), (b), (c) are collectively referred to as the reserved portion of the said land.

D [6] Later, the defendant surrendered the reserved portion of the said land to the government. Knowing that the land reserved for the construction of a road is no longer required for its original purpose, the defendant applied for its alienation which was approved on 13 July 1994. The defendant then subdivided it into ten lots and erected ten semi-detached houses. The plaintiffs also discovered that the portion of the land reserved for the mosque is still vacant.

E [7] Based on the above the plaintiffs alleged that the defendant has breached the said agreement and/or its fiduciary duty.

THE DEFENCE

F (1) The portion of the said land reserved for the construction of a road and mosque was no longer the subject matter of the agreement since it has been surrendered to the government on 20 April 1993.

G (2) The defendant applied for the government land and not the land which is the subject matter of the agreement.

(3) The defendant denies that there is any fiduciary duty owed to the plaintiffs for the following reasons:

H (i) there is no intention to create any fiduciary relationship between the plaintiffs and the defendant under the agreement; and

(ii) even if there is fiduciary relationship (which is denied) it has ended on the 20 November 1992 when the plaintiffs chose their units.

I (4) The plaintiffs have received all their entitlements under the agreement.

(5) The construction of a mosque is the responsibility of the state government and not the defendant.

- [8] The declaratory orders sought by the plaintiffs are: A
- (a) A declaration that the defendant has acted in breach of its fiduciary duty; B
 - (b) A declaration that the plaintiffs are entitled to three of the lots erected on the portion of the said land and for an order that the defendant do transfer three of the said lots to the plaintiffs; C
 - (c) A declaration that the plaintiffs are entitled to 30% of the portion of the said land reserved for the mosque; D
 - (d) A declaration that the plaintiffs are entitled to 30% of the prevailing market value of the land reserved for the mosque; E
 - (e) An order that the defendant do pay the plaintiffs 30% of the prevailing market value of land reserved for the mosque; F
- [9] Alternatively: G
- (f) A sum equivalent to 30% of the prevailing market value of the said lots erected on the portion of the said land; H
 - (g) A sum equivalent to 30% of the prevailing market value of the portion of the said land reserved for the mosque; I
 - (h) Damages
 - (i) Interests; and
 - (j) Costs. F

ISSUES OF FACTS AND LAW

[10] The joint venture agreement is to be construed together with the irrevocable power of attorney. The preambular paragraphs to the irrevocable power of attorney dated 30 December 1992 (PA) provide, inter alia, as follows: G

WHEREAS the Landowners had entered into a Joint-Venture Agreement with DARO (M) SDN. BHD. (hereinafter referred to as 'the Developer') to develop the said land into a housing estate known as 'Taman Wangsa Cheras' (hereinafter referred to as 'the said Project'). H

KNOW YE NOW that We, KUAN CHIT (NRIC NO: 1213744), CHONG CHONG BING (NRIC NO: 2699160), CHONG CHOONG HAI (NRIC NO: 4660513), CHONG CHOONG LOK (NRIC NO: 5491568), CHONG CHOONG HO (NRIC NO: 6882618), CHONG CHOONG HOOI (NRIC NO: 4916058) hereby nominate and appoint DARO (M) SDN. BHD. to be our true and lawful attorney for us and in our names to do all or any of the following acts or things in respect of the said land with regards to the Developer's Units I

- A** which carry individual Titles and which have been subdivided from the said land, the particular are more particularly described in the Appendix A annexed herewith (hereinafter referred to as 'the Developer's Units') and a Layout Plan is annexed herewith and marked as 'Appendix B'.
- ...
- B** (2) To surrender to any other extra land to the relevant Authorities required under the said Project and for that purpose to sign and execute all such instruments and documents.
- ...
- C** [11] It is found that the defendant has asserted a bare denial to the fiduciary relationship established arising out of the express terms of the irrevocable power of attorney read with the relevant provisions of the joint venture agreement dated 28 January 1992 ('JVA'). The relevant provisions of
- D** the JVA state, inter alia:
- Section 2.03
- Upon signing of this Agreement, the Landowner shall execute a Specific Irrevocable Power of Attorney in favour of the Developer to enable the Developer to execute such documents for the application to the relevant authorities for the
- E** Housing Scheme including application for conversion, subdivision, approval of layout plan and buildings plan.
- Section 13 NO PARTNERSHIP BETWEEN LANDOWNERS AND DEVELOPER
- F** It is hereby declared by the Landowner and the Developer that this Agreement shall not create any form of partnership whatsoever between them and that nothing in this Agreement shall be construed to make any party hereto the partner, representative or agent of the other party and neither party shall hold himself out or represent himself to be a partner, representative or agent of the other party hereto nor shall any party be liable for or bound by any act or omission of the other
- G** party.
- Section 23 MUTUAL TRUST
- In entering into this Agreement the parties hereto recognise that it is impracticable to make provision for every contingency that may arise in the course of performance hereof and accordingly the parties declare it is their intention that this
- H** Agreement shall operate between them with fairness and without detriment to any of them. If by reason of any unforeseen occurrence of development or charges in the law of policy of the government the operation of this Agreement is likely to cause any inequitable hardship to one or more parties contrary to the spirit of this Agreement, the parties hereto will negotiate immediately in good faith and use
- I** their endeavours to agree upon such notice as may be necessary and equitable to remove the cause or causes of the same.

[12] In the circumstances of this case the relevant paragraph of the PA which are to be further considered is:

...

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(14) For valuable consideration received, I hereby declare and confirm that this Power of Attorney shall be irrevocable. This Power of Attorney is pursuant to a Joint Venture Agreement between the Landowners and Daro (M) Sdn Bhd.

...

B

[13] The authority vested in the defendant is derived from the PA and the terms thereof are vested for the purposes of the joint venture. The combined provisions of the PA and the JVA establish a fiduciary relationship.

C

[14] By definition a fiduciary relationship arises where one person has undertaken to act for another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing feature of such a relationship is the fiduciary's duty of loyalty. Thus he must act in good faith, must not profit from his position and he must not place himself in a position where his interest and his duty may conflict. In *Bryant, Powis and Bryant Ltd v La Banque du Peuple* [1893] AC 170 at p 177 Lord Macnaghten stated, inter alia:

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Nor was it disputed that powers of attorney are to be construed strictly — that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found to be within the four corners of the instrument, either in express terms or by necessary implication.

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[15] In *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474 the judgment of Jemuri Serjan CJ (Borneo) of the then Supreme Court dealt with the question of a fiduciary relationship. In the JVA in this action before me it is stated that the relationship is not one of a partnership but the statements of the learned judge explained the fiduciary relationship as follows:

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With respect to the question of fiduciary relationship between the parties, learned counsel for the respondent referred us to the definitions of 'Trust' and 'Trustee' in the Specific Relief Act 1950 (Act 137) where fiduciary ownership and fiduciary character are included. It is the respondent's case that a fiduciary relationship is established between the appellant and the respondent when they entered into the joint venture agreement. He supported his proposition by citing the Australian Supreme Court case of *Brian Pty Ltd v United Dominions Corp Ltd*. Samuels JA at p 506 says that after reviewing the authorities, he is of the opinion that joint venturers owe to one another the duty of utmost good faith due from every member of a partnership towards every other member. In the same case Hutley JA at p 496 has this to say on this subject:

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- A** Though joint venture agreements are common, particularly in the resource development field, there is little authority as to the responsibilities of the joint venturers, inter se. In *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321, what was described as a joint venture was held to be a partnership. That joint ventures have fiduciary relationships, inter se would seem to be essential for the efficacy of the device.
- B**

In the High Court of Australia case of *Jenyns v Public Curator (Q)* Dixon CJ, McTiernan and Kitto JJ have this to say at p 133:

- C** We are not here dealing with any of the traditional relations of influence or confidence — solicitor and client, physician and patient, priest and penitent, guardian and ward, trustee and cestui que trust. It is a special relationship set up by the actual reposing of confidence. It is therefore necessary to see the extent and nature of the confidence reposed and whether it involved any ascendancy over the will of the person supposedly dependent on the confidence.

- D** The judges here were talking about fiduciary relations between the parties. In the case of *James Birtchnell & Anor v The Equity Trustees, Executors and Agency Co Ltd & Anor* Dixon CJ at p 407 explains the fiduciary relationship between partners and how the relationship is to be determined. This is what he says:

- E** The relationship between partners is, of course, fiduciary. Indeed, it has been said that a stronger case of fiduciary relationship cannot be conceived than that which exists between partners. 'Their mutual confidence is the lifeblood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on' (per Bacon VC in *Helmores v Smith* (1890) 15 App Cas 223 at p 225; (1886) 35 Ch D 436 at p 444). The relation is based, in some degree, upon a mutual confidence that the partners will engage in some particular kind of activity or transaction for the joint advantage only. In some degree it arises from the very fact that they are associated for such a common end and are agents for one another in its accomplishment. Lord Blackburn found in this consideration alone sufficient reason for the fiduciary character of the partnership relation (*Cassels v Stewart* (1881) 6 App Cas at p 79). *The subject matter over which the fiduciary obligations extend is determined by the character of the venture of undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties, whether embodied in written instruments or not, but also from the course of dealing actually pursued by the firm.* Once the subject matter of the mutual confidence is so determined, it ought not be difficult to apply the clear and inflexible doctrines which determine the accountability of fiduciaries for gains obtained in dealings with third parties. (Emphasis added.)
- F**
- G**
- H**

- I** That passage was approved by Lord Wilberforce in the case of *New Zealand Netherlands Society Oranje Incorporated v Kuys & Anor*. At p 1226 Lord Wilberforce says, after quoting the relevant passage of Dixon J's judgment:

This was said in the context of a partnership but the principle must be of general application.

We would, with respect, accept this proposition ...

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[16] The plaintiff has also cited *Hartela Contractors Ltd v Hartecon JV Sdn Bhd and Anor* [1999] 2 MLJ 481 relying on the following (per Gopal Sri Ram JCA) at p 497:

B

It is settled that parties to a joint venture stand in a fiduciary position to each other. The scope or extent of the duties that joint venturers owe each other depends upon varied considerations. These would encompass (but are not limited to) the nature of the particular joint venture, its subject matter, the relevant documents passing between the parties, including any agreement upon which the particular venture is founded and the attendant circumstances. Here, as in other areas of equity jurisprudence, there is no substitute for a meticulous examination of the facts. If authority is required for these propositions it may be found in the decision of the Supreme Court in *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474.

C

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It is axiomatic that mutual trust and confidence between joint venturers is essential for the proper working of the relationship. And where, as in the present instance, there is reliance by one joint venturer upon the skill or expertise professed by the other in the subject matter of the enterprise, there is, in my judgment, a duty upon that other to use his best endeavours to ensure the success of the venture. Equity will, in my view, imply such an obligation in the absence of an express term in the particular joint venture agreement.

E

[17] Having elaborated the legal principles as aforesaid it is clear that there must be strict adherence to the terms of the power of attorney. One of the terms of the PA states:

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To surrender to any other extra land to the relevant authorities required under the said project and for that purpose to sign and execute all such instruments and documents.

G

[18] From the aforementioned it is true that the parties are to be taken to be aware that there has to be a surrender of certain lands.

H

[19] However it was during the subsistence of the JVA that the defendant made a unilateral change and modification to the status of the land. From the evidence adduced the court is not satisfied on the balance of probability that the defendant was told to surrender his own entitlement under the JVA.

I

[20] The conflict of interests displayed by the unilateral action of Daro is elucidated in P14 in a letter dated 10 February 1998 from the solicitors for the plaintiff. The relevant parts are as follows:

- A** Plaintiff tersebut sebelum tindakan guaman tersebut di atas dimulakan adalah pemilik kepada tanah yang dipegang di bawah Geran No. 23269, Lot No. 1580, Mukim Cheras, Daerah Ulu Langat. (Tanah tersebut). Plaintiff tersebut telah memasuki satu perjanjian usaha-sama bertarikh 28.1.92 (Perjanjian tersebut) dengan Daro (M) Sdn Bhd di mana Plaintiff tersebut telah bersetuju untuk
- B** memberi dan Defendan telah bersetuju untuk memajukan Tanah tersebut menjadi satu Skim Perumahan Secara Sama.
- Satu Surat Kuasa juga telah ditandatangani oleh Plaintiff tersebut dan Daro untuk, antara lain, menyerahkan tanah yang berlebihan kepada badan-badan berkuasa yang berkenaan. Menurut pelan bangunan dan spesifikasi untuk Skim Perumahan tersebut, sebahagian daripada Tanah tersebut telah disimpan untuk tujuan pembinaan jalanraya. Sesalinan Borang 12B Permohonan Untuk Menyerahkan Balik Tanah bertarikh 20 April 1993 telah ditandatangani oleh Daro untuk dan bagi pihak Plaintiff tersebut di mana sebahagian daripada Tanah tersebut telah dikembalikan kepada Pemungut, Daerah Ulu Langat untuk tujuan pembinaan jalanraya ataupun lorong.
- C**
- D** Walaubagaimanapun pada ataupun lebih kurang bulan Mei ataupun Jun 1997, Plaintiff tersebut telah mendapat tahu bahawa Daro telah membina 10 unit rumah semi-detached di atas Plot tersebut yang dipecah bahagikan kepada lot-lot yang dipegang di bawah H.S. (D)39501 P.T.NO.4921, H.S. (D) 39502 P.T.NO 4922, H.S. (D) 39503 P.T.NO 4923, H.S. (D)39504 P.T.NO 4924, H.S. (D) 39505 P.T.NO 4925, H.S. (D) 39506 P.T.NO 4926, H.S.(D) 39507 P.T.NO 4927, H.S. (D) 39508 P.T.NO 4928, H.S. (D) 39509 P.T.NO 4929, H.S. (D) 39510 P.T.NO 4930 kesemuanya dalam Mukim Ulu Langat (selepas ini dirujuk sebagai 'Lot-lot tersebut') dan bukan jalanraya yang dicadangkan seperti yang dinyatakan di dalam pelan bangunan dan spesifikasi Skim Perumahan.
- E**
- F** Pada ketika ini, terdapat pertikaian di antara Plaintiff tersebut dengan Daro. Oleh itu, kami ingin mendapatkan sedikit maklumat mengenai Plot tersebut sebelum Plot tersebut diberimilikan kepada Daro.
- Pihak Tuan melalui sepucuk surat bertarikh 24 November 1994 (Ruj No: Bil(10) dlm PTDUL 1/6/365-94) dan 20 April 1995 (Ruj No: Bil(13) dlm PTDUL 1/6/365-94) telah meluluskan permohonan Daro untuk Pemberimilikan tanah di atas Tanah Kerajaan seperti yang dirujuk di atas. Sesalinan surat-surat tersebut adalah dilampirkan di sini untuk kesenangan rujukan Tuan. Kami dengan sesungguhnya percaya bahawa pemberimilikan tanah kepada Daro adalah disebabkan oleh sebab-sebab yang tertentu di mana kami tidak ketahui dan bahawa pihak Tuan memang akan memberitahu Daro mengenai ketidakinginan Plot tersebut untuk pembinaan jalanraya lagi. Anakguam kami, sebagai Tuanpunya Tanah tersebut sebelum Tanah tersebut dipecahkan dan diserahkan balik tidak menerima sebarang surat daripada Daro ataupun pihak Tuan mengenai perubahan tujuan pihak Tuan. Oleh itu, kami amat berbesar hati jika pihak Tuan dapat memberitahu pihak kami:-
- G**
- H**
- I**
- (a) bila pihak Tuan tidak inginkan Plot tersebut untuk tujuan pembinaan jalanraya;
 - (b) bila dan bagaimana pihak Tuan memberitahu Daro bahawa pihak Tuan tidak inginkan Plot tersebut untuk tujuan pembinaan jalanraya;

(c) adakah pihak Tuan memberitahu anak guam kami pihak Tuan tidak inginkan Plot tersebut untuk tujuan pembinaan jalanraya; jika ada, bila dan bagaimana;

A

(d) Repot penilaian yang disediakan oleh Jabatan Penilaian dan Perkhidmatan Harta, Kementerian Kewangan tentang nilai Plot tersebut untuk Pemberimilikan tanah.

B

Kami amat berbesar hati jika pihak Tuan juga sudi memberikan kepada pihak kami surat-surat dan dokumen-dokumen yang berkenaan dengan soalan-soalan yang dikemukakan di atas.

C

[21] The reply in P16 is as follows:

Berhubung dengan surat tuan bertarikh pada 10hb. Februari, 1998 mengenai perkara di atas adalah dimaklumkan bahawa Majlis Mesyuarat Kerajaan Negeri telah meluluskan permohonan tanah tersebut pada 13hb. Julai, 1994 berdasarkan kepada pindaan pelan tatatur yang telah diperakukan oleh Jabatan Perancang Bandar Dan Desa Negeri Selangor.

D

Mengenai dengan simpanan jalan yang telah diubah kepada bangunan pula, ianya juga adalah tertakluk kepada pelan pindaan berkenaan.

E

[22] The letter does not furnish any explanation regarding the circumstances of the alleged surrender.

[23] The chronology and sequence of the stages undertaken by the defendant indicate on the balance of probabilities that P19 and P11 were undertaken with the knowledge that the land 'Tanah Simpanan Jalan 100' were indeed no longer required. It is to be noted that the PA executed in favour of the defendant was effected the same date as P6 was effected. P6 which was approved on 20 April 1993 revealed that the road reserve and vacant land were surrendered in accordance with s 300 of the National Land Code. The defendant has failed to furnish any credible evidence that PT 4247 was acquired. Being a developer it was indeed questionable and odd that the defendant could not recall when the alleged acquisition was alleged to have occurred. Exhibits P11, P19, P18, P16 reveal that the defendant had undertaken certain calculated steps. The combined evidence of SP2 and SP3 indicate the deliberate steps taken on the part of the defendant.

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[24] The defendant is not a broker and in dealing with the alleged surrender in a manner that is subterfuge in character it is tantamount to a repurchase of his principal's interests and hence amounting to making a secret profit. There was no reasonable explanation given for the so called surrender of the defendant's land. Even assuming that there were to be an exchange which was rather unusual without further explanation, it would appear on the

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- A evidence that even before the purported exchange, it could not be said that the plaintiffs could no longer have an interest when the land was no longer required for public purposes.
- B [25] I agree that the ‘alleged surrender’ of the land does not change its character of ‘unused unwanted land’ since the way in which the dealings with the land by submitting fresh layout plans and precomputation without material disclosure to the plaintiffs lead to the inference that the defendant knew before hand that the land was not intended for the purpose for which it was supposed to have been surrendered.
- C [26] The defendant had asserted that he had offered the ‘tea money’. The court is not satisfied what purpose it would serve if not to induce one or two of the plaintiffs to believe that he was making an attempt to get the land to be realienated but for whose benefit and for what purpose. Again it could be
- D seen that the defendant was using to his advantage the PA in a manner that was in breach of his duty. An adverse inference is capable of being drawn against him.
- E [27] In the circumstances of this case I am of the view that the alternative relief sought is a more appropriate remedy since the houses on the lots may not be capable of being allotted to the plaintiffs:
- (a) a declaration that the defendant has acted in breach of its fiduciary duty;
- F (b) a declaration that the plaintiffs are entitled to a sum equivalent to 30% of the prevailing market value of the lots on the said land;
- (c) a declaration that the plaintiffs are entitled to a sum equivalent to 30% of the prevailing market value of the said land reserved for the mosque;
- G (d) interest at 8%pa on the sum awarded from the date of filing of the writ of summons until the date of full realisation; and
- (e) costs.
- H *Plaintiffs’ alternative claim allowed.*

Reported by Mashrifah Ravendran

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